

IN THE COURT OF APPEALS OF THE STATE OF IDAHO

Docket No. 35922

<b>RALPH W. BEITZ,</b>	)	<b>2010 Unpublished Opinion No. 304</b>
	)	
<b>Petitioner-Appellant,</b>	)	<b>Filed: January 8, 2010</b>
	)	
<b>v.</b>	)	<b>Stephen W. Kenyon, Clerk</b>
	)	
<b>STATE OF IDAHO,</b>	)	<b>THIS IS AN UNPUBLISHED</b>
	)	<b>OPINION AND SHALL NOT</b>
<b>Respondent.</b>	)	<b>BE CITED AS AUTHORITY</b>
	)	

---

Appeal from the District Court of the Fourth Judicial District, State of Idaho, Ada County. Hon. Michael E. Wetherell, District Judge.

Order denying application for post-conviction relief, affirmed.

Molly J. Huskey, State Appellate Public Defender; Justin M. Curtis, Deputy Appellate Public Defender, Boise, for appellant.

Hon. Lawrence G. Wasden, Attorney General; Jennifer E. Birkin, Deputy Attorney General, Boise, for respondent.

---

GRATTON, Judge

Ralph W. Beitz appeals from the district court's order denying his application for post-conviction relief following an evidentiary hearing. We affirm.

Beitz pled guilty to felony driving under the influence, Idaho Code §§ 18-8004, 18-8005(5), and was sentenced to imprisonment for a period of five years with two years determinate. This Court affirmed Beitz's judgment of conviction and sentence. *State v. Beitz*, Docket No. 33219 (Ct. App. May 7, 2008) (unpublished).

Beitz filed an application for post-conviction relief. The district court dismissed certain claims and held an evidentiary hearing on the ineffective assistance of counsel claims. Thereafter the district court entered an order denying the ineffective assistance of counsel claims. Beitz appeals contending only that the district court failed to specifically address one of his

claims of ineffective assistance of counsel and, therefore, the matter should be remanded to the district court for consideration of that claim.<sup>1</sup>

Beitz's application for post-conviction relief included a claim that counsel was ineffective for failing to advise him of a Fifth Amendment right to refuse to participate in the presentence investigation (PSI). At the evidentiary hearing, Beitz testified that his counsel did not inform him that he had a right not to cooperate with the presentence investigator. In its order, the district court first noted the issues presented, including that "counsel failed to inform him of his right not to participate in the PSI, and failed to object to information contained in that report." In the body of district court's order, the court commented specifically on the alleged failure to object to information in the PSI, but not the alleged failure to inform him of a right not to participate in the PSI. Based upon this lack of specific discussion in the order, Beitz contends that this Court should remand the matter to the district court for consideration of that claim.

In *State v. Jensen*, 126 Idaho 35, 38, 878 P.2d 209, 212 (Ct. App. 1994), we held that "in a post-conviction relief proceeding the district court is required to make findings of fact and conclusions of law sufficient to provide a record for appellate review." However, we also held that "findings are neither required nor possible where no evidence was presented upon which to base such a finding." *Id.* While the district court here did not provide specific discussion or analysis of the claim, the district court determined that "based on the evidence introduced at hearing, the Court finds Petitioner has failed to demonstrate that Mr. Geddes performance was deficient." Further, the district court found that "even if the Petitioner had succeeded in showing his counsel's performance was deficient, there has been no prejudice shown." The district court's finding as to the lack of evidence of prejudice applied to all claims at issue as the district court made no other findings as to prejudice specific to any claim. The district court's finding regarding prejudice is sufficient for this Court's review.

We note that Beitz refers only to his testimony that his counsel did not advise him he need not cooperate in the PSI and provides no argument or reference to evidence regarding prejudice. The district court's finding that Beitz failed to demonstrate prejudice as to any of the

---

<sup>1</sup> We encourage counsel to move the district court for reconsideration or clarification in cases in which the court is believed to have overlooked ruling on a specific claim prior to appeal.

claims presented is supported by the record.<sup>2</sup> The district court's order denying Beitz's application for post-conviction relief is affirmed.

Judge GUTIERREZ and Judge MELANSON, **CONCUR.**

---

<sup>2</sup> We also note that in both *Stuart v. State*, 145 Idaho 467, 470, 180 P.3d 506, 509 (Ct. App. 2007) and *Hughes v. State*, \_\_\_ Idaho \_\_\_, \_\_\_ P.3d \_\_\_ (Ct. App. 2009), we held that the PSI is not a critical stage and that counsel, therefore, could not have provided ineffective assistance by failing to advise prior to or during the investigation.